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45736 7590 07/01/2010 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP 7700 Forsyth Boulevard Suite 1800 St. Louis, MO 63105				
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JASON MATTHEW ENGLISH, RICHARD JOSEPH HANTKE,
and HEATHER ANNE SOREBO

Appeal 2009-003199
Application 10/719,613
Technology Center 3700

Decided: June 30, 2010

Before JOHN C. KERINS, STEVEN D.A. MCCARTHY, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

O'NEILL, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Jason Matthew English et al. (Appellants) seek our review under 35
U.S.C. § 134 of the final rejection of claims 1, 3, 4, 6-16, 18-25, 28-41, and

44-63. Appellants have canceled claims 2, 5, 17, 26, 27, 42, and 43.¹ We have jurisdiction under 35 U.S.C. § 6(b).

The Invention

The claimed invention is to absorbent articles used for personal care. Spec. 1, para. [0001].

Claim 24, reproduced below, is illustrative of the subject matter on appeal.

24. An absorbent article for disposition at least partially within the vestibule of a female wearer, said absorbent article comprising:

an absorbent structure sized and configured for insertion at least partially within the vestibule of the female wearer, said absorbent structure comprising in the range of about 5 weight percent to about 15 weight percent superabsorbent material, said absorbent structure having a basis weight in the range of about 150 to about 400 grams per square meter and a density in the range of about 0.05 to about 0.13 grams per cubic centimeter, said absorbent structure having a saturation capacity as determined by a Saturation Capacity and Retention Capacity Test of at least about 15 grams/gram and a retention capacity as determined by said Saturation Capacity and Retention Capacity Test of at least about 3 grams/gram.

The Prior Art

The Examiner relies upon the following as evidence of unpatentability:

Dulle	US 3,856,013	Dec. 24, 1974
Brandt	US Re. 32,649	Apr. 19, 1988
Zelazoski	US 5,536,555	Jul. 16, 1996
Bewick-Sonntag (hereinafter "Bewick '929")	US 5,836,929	Nov. 17, 1998

¹ The Examiner noted that Appellants' Claims Appendix contains a minor error, *viz.*, claim 5 should be numbered as claim 6. Ans. 2.

Bewick-Sonntag (hereinafter US 2003/0191442 A1 Oct. 9, 2003
“Bewick ’442”)

The Rejections

The following Examiner’s rejections are before us for review:

Claims 1, 3, 4, 6-16, 18-23, 34, 35, 49, 50, and 56-59 stand rejected under 35 U.S.C. § 103(a) as obvious over Bewick ’442, Dulle, Zelazoski, and Brandt and further in view of Bewick ’929.

Claims 24, 25, 28-33, 36-41, 44-48, 51-55, and 60-63 stand rejected under 35 U.S.C. § 103(a) as obvious over Bewick ’442, Dulle, Zelazoski, and Brandt.

SUMMARY OF DECISION

We AFFIRM-IN-PART.

OPINION

Issue

In light of the Appellants’ contentions and the Examiner’s positions, the determinative issue before us is as follows:

Whether the general conditions of the claims, in particular independent claims 1, 24, and 41, are disclosed in Bewick ’442, Dulle, Zelazoski, and Brandt in order to shift the burden to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article.

Analysis

Claim 1

The general conditions of claim 1 are not disclosed within the combined teachings of Bewick '442, Dulle, Zelazoski, and Brandt in order to shift the burden to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article. The claimed feature of the gel stiffness index for the superabsorbent materials being on the order of 0.5 is not expressly disclosed in Bewick '442. The Examiner relies on Brandt in an attempt to demonstrate that a person of ordinary skill in the art would want to optimize gel stiffness to resist deformation. Ans. 6. However, the Examiner's position is flawed because it is a sweeping generalization based on a few statements in Brandt disclosing that the degree of crosslinking in a hydrogel determines gel strength as it relates to the deformation capability of the material under an applied stress. Brandt, col. 1, ll. 45-55. Brandt fails to disclose a gel stiffness index, much less a gel stiffness index of 0.5. While a person of ordinary skill in the art might consider optimizing gel stiffness, the Examiner does not point to evidence or provide any analysis based on Brandt or the other cited prior art establishing that any such optimization would result in a superabsorbent material with a gel stiffness index of 0.5.

In this regard, the Examiner fails to cogently explain what index value is optimal for gel stiffness. It is apparent that if a hydrogel were too stiff, it would not conform as required by absorbent care products. If a hydrogel were not stiff enough, then the product would deform and could result in leakage. The evidence and analysis presented by the Examiner is too sparse

to determine what a person having ordinary skill in the art would consider an optimal gel stiffness index without resorting to conjecture and speculation.

Accordingly, we are constrained to not sustain the rejection of claim 1 and those claims that depend from claim 1.

Claim 24

The general conditions of claim 24 are not disclosed within the combined teachings of Bewick '442, Dulle, Zelazoski, and Brandt in order to shift the burden to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article. Claim 24 requires the absorbent structure to comprise superabsorbent material within the range of five weight percent to fifteen weight percent of superabsorbent material. In other words, the claimed range is 5% to 15% by weight. Bewick '442 discloses that the preferred range is 25% to 50% by weight. Bewick '442, pg. 10, para. [0114]. The disclosed weight percent ranges in Bewick '442 neither overlap nor touch the claimed range which is what is required in order to conclude that Bewick '442 renders prima facie obvious the general conditions of the claimed weight percent.

Accordingly, the Examiner fails to provide findings of fact or cogent explanation establishing how the claimed range concerning the weight percentage of superabsorbent material was known or obvious and, as such, we are constrained to not sustain the rejection of claim 24 and those claims that depend from claim 24.

Claim 41

Claim 41 recites, and Bewick '442 (col. 10, paras. [0114-0115]) discloses, absorbent structures having the following properties:

Property	Claim 41	Bewick '442
weight percent of superabsorbent material	5% to 35%	25% to 50%
basis weight	150 to 400 g/m ²	100 to 400 g/m ²
density	.05 to .13 g/ccm	.10 to .14 g/ccm

Claim 41 further recites the absorbent structure as having a time to intake a first insult as determined by an Intake and Rewet Test of no more than about 30 seconds. Bewick '442 fails to disclose the time to intake a first insult. The Examiner relies on Zelazoski as the basis for finding that it is beneficial to optimize intake and rewet time. Ans. 5.

Zelazoski discloses a quilted film laminate or composite material that provides a blend of the positive properties from film and fibrous nonwoven cover materials, *viz.*, the clean and dry aesthetics of film covers and soft, cloth-like feel of nonwoven covers. Col. 1, ll. 28-30 and 65-67. In Zelazoski, a series of 24 samples were prepared, based on the fabrication techniques disclosed, to demonstrate the properties of the invention. Col. 12, ll. 43-44. In addition to testing the composite samples themselves, swatches of the 24 samples were cut and placed on top of "a two layer absorbent core with the nonwoven side adjacent the absorbent to simulate the cover material of a personal care absorbent article." Col. 14, ll. 58-61. The manner of measuring the fluid handling properties of the composite 10, *i.e.*, the combination of the film layer 12 and a substrate layer 14, was to measure the intake time for a given quantity of fluid. Col. 14, l. 66 to col.

15, l. 1 (see col. 11, ll. 52-58 for the testing protocol). The results are listed in Tables I through VI. The results indicate that the samples of the composite 10 absorbed a given amount of fluid in less time than the controls. See Tables I-VI. Based on the results disclosed in Zelazoski, a person of ordinary skill in the art would conclude that the material used to make the composite 10 permitted the absorption of fluid to be quicker than control material. See *e.g.*, Col. 19, ll. 1-38. Accordingly, as the Examiner has found and reasoned, Zelazoski does teach the desirability of minimizing intake time which is what the Examiner utilized Zelazoski for when concluding the claimed invention is rendered obvious by the combined teachings of Bewick '442, Dulle, Zelazoski, and Brandt. See Ans. 5 and 11.

Based on the evidence before us, we conclude that the general conditions of the claimed subject matter within claim 41 are disclosed by the prior art, in particular Bewick '442. The ranges disclosed within Bewick '442 overlap the ranges set forth in the claim for weight percent of superabsorbent material, basis weight, and density, which are the only parameters in the claim that define the absorbent structure. While Bewick '442 lacks disclosing the intake time of the absorbent structure disclosed therein, the Examiner has provided ample technical reasoning from Zelazoski's disclosure, the structure of which is utilized as part of personal care absorbent articles, *viz.*, the liner, that the absorbent structure in Bewick '442 inherently possess the claimed characteristic of having an intake time less than 30 seconds.

Alternatively, the Examiner has provided a rational underpinning for the conclusion that an absorbent structure meeting each limitation of claim 41, with the possible exception of an intake time for a first insult of no more

than about 30 seconds, would have been obvious based on the overlap in ranges recited in claim 41 and disclosed by Bewick '442. The Examiner has provided a rational underpinning via Zelazoski for the conclusion that one of ordinary skill in the art would have had reason to try various absorbent cores similar to those disclosed by Bewick '442 including superabsorbant materials so as to reduce the intake time for a first insult of the absorbent structure (e.g., to an intake time of no more than 30 seconds). Since the Appellants themselves describe an intake time of 30 seconds as "relatively high" (*see* Spec., para. [00102]), the Examiner correctly concluded that one of ordinary skill in the art reasonably would have expected such trials to succeed through no more than routine experimentation.

As such, the burden shifted to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article. *See In re King*, 801 F.2d 1324, 1327 (Fed. Cir. 1986); *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). *See also In re Spada*, 911 F.2d 705, 708-09 (Fed. Cir. 1990); *In re Swinehart*, 439 F.2d 210, 213 (CCPA 1971). Appellants have not provided evidence to demonstrate the absorbent structure disclosed in Bewick '442, with the property ranges that overlap the claimed property ranges, does not necessarily or inherently possess the intake time of less than 30 seconds. App. Br. and Reply Br. *passim*.

Instead, Appellants appear to challenge the technical reasoning of the Examiner by arguing that Zelazoski's teachings are limited to liners, and a person of ordinary skill in the art would only look to the teachings of Zelazoski for improvements in liners. App. Br. 14. This challenge is unconvincing. The challenge is not on point with the Examiner's utilization

of Zelazoski. As we noted above, the Examiner utilized Zelazoski as part of the technical reasoning needed to conclude that the absorbent structure disclosed within Bewick '442 would necessarily possess an intake time of less than 30 seconds. Additionally, the challenge unduly limits the teachings of Zelazoski to liners for personal absorbent care products. A person of ordinary skill in the art would not consider the teachings of Zelazoski to be limited to liners of personal absorbent care products. Instead, a person of ordinary skill in the art would consider the teachings of Zelazoski to be applicable to any portion of a personal absorbent care product, e.g., the liner, the absorbent structure, or any intermediary structure therebetween.

In view of the foregoing, the Examiner's rejection of claim 41 is sustained. We sustain the rejection of all claims that depend from claim 41 for the same reasons, since Appellants fail to separately argue those claims.

CONCLUSIONS

For claims 1 and 24, the general conditions of the claims are not disclosed in Bewick '442, Dulle, Zelazoski, and Brandt in order to shift the burden to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article.

For claim 41, the general conditions of the claim are disclosed in Bewick '442, Dulle, Zelazoski, and Brandt in order to shift the burden to Appellants to prove that the absorbent article of the combined prior art does not necessarily or inherently possess the characteristics of the claimed absorbent article.

DECISION

The Examiner's decision to reject claims 41, 44 through 55 and 63 as obvious over the prior art is affirmed.

The Examiner's decision to reject claims 1, 3, 4, 6-16, 18-25, 28-40 and 56-62 as obvious over the prior art is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

mls

CHRISTOPHER M. GOFF (27839)
ARMSTRONG TEASDALE LLP
ONE METROPOLITAN SQUARE
SUITE 2600
ST. LOUIS, MO 63102